OCBC BANK (M) BHD & ANOR

v.

LIVISION SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[SUIT NO: 22-48-98-III/11]
7 DECEMBER 2000

CIVIL PROCEDURE: *Service - Writ of summons - Defendant the guarantor of default loan taken with plaintiff - Whether service on defendant should be personal service*

CIVIL PROCEDURE: *Service - Writ of summons - Service accepted on defendant's behalf - Whether irregular - Whether authorised by defendant*

CIVIL PROCEDURE: *Judgment - Default judgment - Judgment entered with interest rate far in excess of that contractually agreed upon - Whether judgment irregular - Whether court could vary interest rate*

CIVIL PROCEDURE: *Judgment - Default judgment - Whether good defence on merits - Whether application to set aside judgment should be allowed*

The 4th defendant applied, *inter alia*, to set aside: (i) the claim of the 1st plaintiff bank ('the plaintiff') against him as guarantor for moneys owing under a loan facility granted by the plaintiff to the 1st defendant, and (ii) the judgment-in-default that was obtained by the plaintiff against him. The grounds for the application were that: (i) service of the plaintiff's writ of summons and statement of claim on him was bad in law; (ii) the plaintiff had entered judgment on interest at a rate which far exceeded the rate which the parties had contracted for; and (iii) there was a good defence on the merits.

The plaintiff claimed that the 2nd defendant had accepted service of the writ on behalf of the 4th defendant and that the 4th defendant delayed in making this application.

Held:

[1] As the 4th defendant was sued as a guarantor, the writ must be personally served on him. Further, there was no evidence led to show that the 4th defendant had authorised the 2nd defendant to accept service on his behalf. The fact that the 2nd defendant was the 4th defendant's father and also the director of the 1st defendant was immaterial.

[1a] From the copy of the International Passport that was exhibited, the 4th defendant was in New Zealand at the material time. Therefore, he was not evading service and had conclusively rebutted the evidence that the writ was served on him. It followed that the purported service of the writ on him was irregular and bad in law.

[2] In *Malayan United Bank Berhad v. Mohamed Salleh Mohamed Yusoff & Ors*, it was held that an accidental slip should be corrected. But where the interest rate was sought to be justified or where the amount involved was significantly large then there was no question of the court varying the interest rate. The plaintiff herein had entered judgment with an interest rate far in excess of that contractually agreed upon by the parties concerned. Therefore, the 4th respondent had a right *ex debito justitiae* to have the judgment-in-default set aside.

[3] The facts showed that this application was filed with reasonable promptitude and *bona fide*. Therefore, there was no delay on the part of the 4th defendant in making this application. The most important consideration in an application to set aside a judgment-in-default is whether there is a defence on merits. The question of delay is secondary.

[4] The plaintiff's earlier applications against the 1st, 2nd and 3rd defendants to strike out their defence was dismissed by the judge therein on the basis that there was a defence on the merits. As the 4th defendant's defence involved the same issues, the court concurred with the finding of the learned judge on the said issues.

[Application of 4th defendant allowed with costs to be taxed unless agreed.]

Case(s) referred to:

Armitage v. Parsons [1908] 2 KB 410 ***(refd)***

Kenneth Allison Ltd (In liq) & Ors v. AE Limehouse & Co (a firm) [1997] 4 All ER 500 ***(dist)***

Khor Ching Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***

Kong Wing Sum v. Public Bank Bhd [2000] 1 CLJ 497 ***(refd)***

Malayan United Bank Bhd v. Mohamed Salleh Mohamed Yusoff & Ors [1988] 2 CLJ 460 ***(refd)***

Tuan Hj Ahmad Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 42 r. 13

Rules of the Supreme Court [UK], Ord. 10 r. 1(1), Ord. 81 r. 3(1)(a)

For the plaintiff - Ann CJ Teo; M/s Lim & Teo

For the 4th defendant - Gabriel Wong En Phin; M/s Detta Samen & Co

Reported by Usha Thiagarajah

JUDGMENT

Zakaria Sam JC:

The Application

By summons-in-chambers dated 8 March 1999 (encl. 106) the 4th defendant applied *inter alia* for the following orders:

1. The purported service of writ of summons and statement of claim both dated 17 March 1998 on him be set aside;

2. That the judgment-in-default of appearance obtained by the plaintiff against him dated 8 July 1999 be set aside, on the grounds that:

    1. He was at all material time residing outside the jurisdiction of Malaysia at or after the date of commencement of this action;

    2. He was not evading service;

    3. The purported service of the writ of summons and statement of claim dated 17 March 1998 on him was not regularly obtained;

    4. The judgment-in-default of appearance dated 8 July 1998 was irregular; and/or

    5. Alternatively, he has a good defence on the merits to the plaintiff's claim.

Facts

The plaintiff company is a bank registered under the Companies Act 1965 with a branch office operating in Kuching at No. 35 Leboh Khoo Hun Yeang.

On 12 October 1994 and 25 November 1995 the plaintiff had granted a total sum of RM7.2 million loan facilities to the 1st defendant. Out of this RM7.2 million, RM4.2 million was for term loan facility and RM3 million for overdraft facility.

These facilities were for the purpose of part financing the purchase of an eight-storey hotel building together with that piece of land, refurbishment of the hotel and working capital for the running of hotel business.

The 2nd, 3rd and 4th defendants were the directors of the 1st defendant's company and became joint and several guarantors of the said facilities under two letters of guarantee dated 5 December 1995 and 18 December 1995 respectively.

This action was commenced by the plaintiff against the defendants herein claiming for the sum of RM4,432,269.03 in respect of the term loan facility and RM3,337,365.03 in respect of the overdraft facility together with the stipulated interest accruing thereof, when the 1st defendant defaulted in the payment of monthly instalments and was in arrears for six months as at 13 October 1997 and that the 1st defendant failed to operate the overdraft account satisfactorily and exceeded the overdraft limit to the extent of RM193,152.72 as at 13 October 1997.

The plaintiffs claim against 2nd, 3rd and 4th defendants for:

i)(a) RM4,432,269.03 in respect of term loan facility.

(b) Interest thereon at the rate of 13.35% p.a. on monthly rests from 9 February 1998 until the date of full and final settlement.

ii)(a) RM3,337,365.03 in respect of the overdraft facility.

(b) Interest at the rate of 13.35% p.a. on monthly rests from 9 February 1998 until the date of full and final settlement.

Judgment-in-default had been entered against the 4th defendant on 8 July 1998.

It is to be noted that the plaintiff had also taken out two similar applications against the 1st, 2nd and 3rd defendants. First summons-in-chambers (encl. 50) was to strike out the amended defence and counter-claim of the 1st defendant and the other dated 29 August 1998 (encl. 61) was to strike out the defence of the 2nd and 3rd defendants. Both applications had been dismissed by Muhammad Kamil Awang J on 24 November 1998.

The Service – Regular Or Irregular?

Wong Lee Kiong (f) in her affidavit-in-opposition (encl. 110) affirmed on 10 November 1999 deposed that several attempts to serve the writ on all the defendants at the address shown in the loan documents, *ie*, at 47 Jalan Tun Ahmad Zaidi Adruce, 93150 Kuching were unsuccessful. However, on 14 April 1998 she managed to contact the 2nd defendant through his phone and informed him that she intended to serve the writ on them failing which substituted service in the newspaper was to be effected. Upon hearing this, the 2nd defendant requested the said writ to be sent by post to him and all the other defendants care of the address of his other company, Lakbima (M) Sdn. Bhd at No. 44 Jalan Radin Tengah, Bandar Baru, Seri Petaling, 57000 Kuala Lumpur.

On 22 April 1998 the writs were sent to the 2nd, 3rd and 4th defendants individually by A.R. Registered post at the above given address.

The 4th defendant in his affidavit-in-support of this application (encl. 106) deposed that during the years of 1995 to 1997, he had resided in New Zealand and worked as an outdoor educator there.

He also denied that the signature on the A.R. card was his as the period between 22 April 1998 and 29 September 1998, he was residing in New Zealand for his post-graduate studies. As such he was not the person who signed the A.R. registered card accompanying the writ. He also had not authorised any person to accept service on his behalf any documents addressed to him personally.

The learned counsel for plaintiff submitted that the service on the 4th defendant was good and cited *Kenneth Allison Ltd (In liq) & Ors v. AE Limehouse & Co (a firm)* [1997] 4 All ER 500. In that case the plaintiff instructed a process server to effect personal service of the writ on the defendants. The process server attended at the defendants' offices, where he told the senior partner's personal assistant that he wished to serve a writ. She consulted one of the partners and he authorised her to accept the writ. She then told the process server that she had been so authorised and received from him a sealed copy of the writ and a form of acknowledgment of service. The defendants subsequently issued a summons seeking an order setting aside service and a declaration that the writ had not been duly served because it had not been served on the firm pursuant to RSC O. 81 r. 3(1)(a) which provides that where partners are sued in the name of a firm the writ may be served on any one or more of the partners. Furthermore it was argued that no personal service of the writ was effected on the partner as required by O. 10 r. 1(1), which provides that a writ must be served personally on each of the plaintiff or his agent.

The House of Lords held that:

> However, service of the writ on the defendants had been effective since service under an ad hoc agreement made in relation to contemplated proceedings, by which one party, knowing that the other party wished to serve process upon him, requested or authorised the other to do so in a particular way which was outside the rules and the other did so, was valid and legally effective as there was nothing in the rules of court restricting consensual service of the writ to the manner specified in O. 10 r. 3, namely an agreement as to service embodied in a wider contract. Accordingly, the plaintiffs were entitled to rely on the ad hoc agreement whereby the partner expressly authorised acceptance of service, which acceptance was communicated to and acted upon by the process server when he handed over the writ.

I fully subscribed to the above judgment.

But the facts in the instant application are different. In this application the 4th defendant is being sued as a guarantor, therefore, the writ must be personally served on him (as opposed to the defendants in *Kenneth Allison*'s case who were partners – any one of them could accept service on behalf of the firm). In her affidavit Wong Lee Kiong clearly stated that it was the 2nd defendant who instructed her to send all the writs to him. No where was it stated that the 2nd defendant had represented to her that he was authorised by the 4th defendant to accept service of the writ on his behalf or that the 4th defendant had authorised the 2nd defendant to accept the service on his behalf. The fact that the 2nd defendant is the 4th defendant's father and also a director of the 1st defendant is immaterial.

From the copy of the international passport exhibited in his affidavit, I have no doubt that in the years of 1995 to 1997 and on 22 April 1998 (the date when the writ was purportedly served on him) to 29 September 1998, the defendant was in New Zealand. This eliminates any notion that he was evading service.

The defendant had conclusively rebutted the evidence that the writ had been served on him. Therefore the purported service of the writ on him is irregular and bad in law.

Was The Judgment Interest Excessive And Not In Accordance With The Agreement?

Schedule 11 – A(a) of the facility agreement dated 27 December 1994 stipulates that "the Borrower shall pay interest on all amounts outstanding from time to time under the overdraft facility at the rate of two point two five per centum per annum (2.25% per annum) above the lender's base lending rate from time to time with monthly rest on a daily basis".

Similarly Schedule 1 of the term loan agreement dated 27 December 1994 stipulates interest at the rate of "two point two five per centum (2.25% per annum) above the lender's base lending rate.

In short, the contractual interest is chargeable at a fluctuating rate based on the variation from time to time in the base lending rate. There is no provision to fix the interest at a fixed rate either upon demand or upon judgment.

Judgment, on the other hand, was entered at "the rate of 13.35% per annum on monthly rests from 9 February until the date of full and final settlement" which thereby fixed the interest rate until the date of full settlement contrary to what was contractually agreed upon.

Clearly, the plaintiff had entered judgment on interest at a rate which far exceeded the rate which the parties had contracted for. The letters of offer dated 12 October 1994 and 25 November 1995, merely stipulate interest chargeable at 2.25% above bank's base lending rate per annum for both the term loan and overdraft facilities.

The learned counsel for the 4th defendant submitted if one is to take the plaintiffs base lending rate today at 7.25% per annum and add 2.25% (the margin) to the same, the contractual interest to which the plaintiff would be entitled to charge is only 9.5%, resulting in an excess or difference of 3.85% per annum. The excess interest 3.85% per annum on the alleged outstanding sums under the term loan and overdraft facilities of RM4,432,269.03 and RM3,337,365.03 would have been very substantial, approximately an excess sum of RM296,000 per annum or RM24,000 per month.

The learned counsel for the plaintiff in her reply submitted that if this court is of the view that this judgment-in-default is regular but the 4th defendant has not raised triable issue (save the issue of fluctuating interest rate), this court should vary the judgment instead of setting aside so as to provide the fluctuating interest rates before and after the judgment.

This tantamount to admitting to the issue raised by the 4th defendant. However, is it possible for this court to just amend the interest rate?

In *Armitage v. Parsons* [1908] 2 KB 410 the plaintiff had obtained judgment-in-default of appearance as a result of an error of the judgment which included a sum by way of costs which exceeded by 12s, the amount properly allowable. It was held by the Court of Appeal that (at p. 415):

> In my opinion, Order XXVIII r. 11 (in *pari materia* with Order 20 r. 11 of the Rules of the High Court 1980), which provides that 'clerical mistakes in judgment or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal', enables us to deal with this case so as to do substantial justice.

And later at p. 417:

> To my mind it is clear, as a matter of good sense and justice, that this was an accidental slip which under Order XXVIII r. 11 ought to be corrected, and that the whole judgment should not be set aside because of a mistake to the insignificantly amount of 12s. I do not think by so amending the judgment any of the rules or any principle of law is infringed.

What constitute clerical mistakes and accidental slip or omission was elaborated by Zakaria Yatim J (as he then was) in *Malayan United Bank Bhd v. Mohamed Salleh Mohamed Yusoff & Ors* [1988] 3 MLJ 165:

> In my opinion, if the figure had been entered by mistake or if the solicitor's clerk had inadvertently filled the wrong figure and the error had not been discovered, then there was clearly an accidental slip which should be corrected. Where there was such a mistake and the amount involved was insignificantly small, the mistake could be corrected and the judgment in default should not be set aside (see *Armitage v. Parsons*).

In the above ease the respondent had entered judgment-in-default of appearance against the applicant with interest rate from date of judgment to date of realisation far in excess of the statutory rate of 8% p.a.

Having considered the facts of the case His Lordship ruled:

> In the instant case I do not think there was a mistake or accidental slip in putting the rate of interest at the rate of 17.75% pa. It was stated in the statement of claim; it was stated in the judgment-in-default and indeed Mr Chandran strenuously argued before me to justify that the respondent was entitled to that rate of interest. The respondent in fact deliberately included interest at the rate of 17.75% from the date of judgment to date of realisation. If this rate of interest is calculated on the basis of the principal sum of $3,000,000 the amount would be significantly large. The principle in *Armitage v. Parsons* does not apply in the present case and there is no question of the court varying the rate of interest at this stage.

The learned counsel for plaintiff then cited *Khor Ching Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 wherein Gopal Sri Ram JCA held:

> For the purpose of this appeal, I shall assume, without deciding, in the fourth defendant's favour, that the default judgment was entered for too much because the interest rate there stipulated was greater than that permitted by law. It is still a matter that may be cured by amendment without any resultant prejudice to anyone. The plaintiffs had applied to just that. It was that application which alerted the fourth defendant, and he moved to set aside the whole of the judgment.

It is pertinent to note that the plaintiff in the abovesaid case took upon themselves to apply to amend the judgment and this alerted the defendant to take out an application to set aside the judgment.

ln the present case the plaintiff too had taken out a summons to amend the award of interest but for the reasons best known to them they withdrew the said application.

In conclusion I would sum up that there is no contractual basis upon which the rate of 13.5% p.a. is charged. It is not a case of merely failing to comply with the rules of procedure, but a case of entering judgment for which the plaintiff is not contractually entitled to do so, thereby affecting the 4th defendant's substantive right not to be liable for more than what had been contractually agreed upon.

Since the plaintiff had entered judgment with the rate of interest far in excess of the contracted rate, the 4th respondent has a right *ex debito justitiae* to have the judgment set aside.

Delay In Making This Application

The learned counsel for plaintiff submitted that there has been unreasonable delay in making this application to set aside the writ and judgment and there is no explanation in the 4th defendant's affidavit as to the reason for the delay.

It is not disputed that the said judgment-in-default of appearance was never served on the 4th defendant. Therefore O. 42 r. 13 of the Rules of the High Court 1980 does not apply here.

It was held in *Tuan Hj Ahmad Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 that:

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that, it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O. 2 r. 2(1) of the Rules of the High Court 1980.)

The 4th defendant came to know about this judgment from the search of the court docket on 6 February 1999 and within a month took out this application on 8 March 1999 to set aside the judgment.

It is also pertinent to note that the 4th defendant had filed this application on 8 March 1999, ahead of the plaintiff's application (filed on 31 May 1999) to amend the said judgment-in-default (which was later withdrawn).

It is clear that this application was filed with reasonable promptitude and is *bona fide*.

The most important consideration in an application to set aside a judgment-in-default is whether there is a defence on merits. The question of delay is secondary (See *Malayan United Bank Bhd*'s case *(supra)*).

Good Defence On The Merit

The 4th defendant's affidavit of merit/proposed defence is substantially grounded on similar facts and issues as that of the 1st, 2nd and 3rd defendants' defence, the triability of which had already been adjudicated upon earlier by His Lordship Muhammad Kamil Awang J, on 24 November 1998 where he

dismissed the plaintiff's applications and held that the issues raised therein, in particular on the contractual requirement to review the banking facilities and on the alleged facts relating to estoppel, merited going to trial.

Learned counsel for 4th defendant submitted that as both the plaintiff's earlier applications and this present application involved the same issues, thus he would rely substantially on the said judgment. The said issues had been adjudicated upon and held to be triable issues.

In reply, the learned counsel for plaintiff submitted that the 4th defendant was not a party to the earlier applications to strike out the 1st defendant's defence and counter-claim and the 2nd and 3rd defendants' defence, therefore the plaintiff is not estopped by the earlier decision from responding to the issues raised by the 4th defendant in the present application. She cited a recently decided case by the Court of Appeal, *Kong Wing Sum v. Public Bank Bhd* [2000] 1 CLJ 497.

It is not disputed that both the plaintiff's earlier applications (encl. 50 and 61) and the present application, the defence involved the same issues.

I have the liberty to read the judgment of Muhammad Kamil bin Awang J in respect of the plaintiff's earlier applications. I concur with His Lordship's finding on the said issue and I do not intend to deliberate any further on it.

I hereby allow the 4th defendant's application with costs to be taxed unless agreed.